AND
BRIEFS

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No. 15-1406

In the Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,
PETITIONERS,

v.

LEROY HAEGER, DONNA HAEGER, BARRY HAEGER, AND SUZANNE HAEGER,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is a federal court required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process?

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INTEREST OF THE *AMICUS CURIAE*[1]

Since its founding in 1878, the American Bar Association ("ABA") has played a formative role in the development of the profession of law in the United States. Integral to that work has been the promotion of legal ethics, along with guidelines for punishing lawyer misconduct. These considerations are embodied in multiple ABA publications, such as the ABA's MODEL RULES OF PROFESSIONAL CONDUCT; CIVIL DISCOVERY STANDARDS; STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE; and the STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE. The ABA also works to protect the due process rights guaranteed by the Constitution.

The ABA fully supports the proposition that federal courts must have adequate power to sanction parties and attorneys for misconduct in the litigation of a case, whether through Rule 11, the discovery rules, or (where necessary and appropriate) the exercise of the court's inherent power.[2] Indeed, the ABA has adopted a strong stance on sanctions for discovery abuse: "'When a party fails to comply with

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE ("SPECIAL FUNCTIONS OF THE TRIAL JUDGE"), Standard 6-4.1.

its disclosure obligations the court has a *duty* to impose appropriate sanctions.'"[3]

Inherent sanctioning power should be exercised with caution and restraint, however. A court ordinarily should not resort to inherent power to punish discovery abuse if the conduct and the appropriate sanction are explicitly addressed by the Federal Rules of Civil Procedure. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991). And where, as here, the relevant rule and the inherent power share the same goals, courts should strive for consistency when imposing sanctions regardless of which sanctioning power they are relying on. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (discussing the need for consistency in attorney-fee sanctions).

To promote uniformity in sanctions practice, the ABA has adopted the various standards and guidelines listed above.[4] These standards echo the due process requirement that, before sanctions are imposed, the alleged offender must be afforded fair notice and an opportunity to be heard.[5] And, regarding the types of sanctions to consider, the ABA standards advise that a court may award reasonable

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[3] ABA CIVIL DISCOVERY STANDARDS, Standard I.3, cmt. (emphasis added) (noting that this position, adopted by the ABA in 1988, is consistent with state and federal discovery rules).

[4] *See, e.g.*, STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE ("STANDARDS FOR RULE 11 PRACTICE"), American Bar Association, 121 F.R.D. 101, 104 (1988).

[5] *Id.* at 127.

attorney's fees incurred as a result of the misconduct,[6] but should select the least severe sanction adequate to serve the goal of that punishment.[7]

For example, Rule 37(c) and inherent power have common goals which authorize compensatory attorney-fee sanctions to punish discovery abuses that do not violate a court order. *See* Fed. R. Civ. P. 37(c)(1)(A); *Chambers*, 501 U.S. at 46. Under both the rule and inherent power, though the sanction serves to punish the transgressor, the punishment is limited by a remedial measure. *See id.* Thus, under the ABA standards, a court can impose an attorney-fee sanction to punish discovery abuse, but the amount of that sanction should not exceed the extra fees caused by the misconduct.

When considering what weight to give the ABA standards, the Court should note that the ABA is the leading and the largest bar association in the United States. Its more than 400,000 members are diverse, coming from all fifty states and other jurisdictions. They include attorneys in large and small law firms, corporations, non-profit organizations, government agencies, prosecutors, public defenders, private plaintiff's and defense counsel, judges, legislators, law professors, law students, and non-lawyer associates in related fields, among others. Moreover, the ABA standards on lawyer-sanctions were developed after

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[6] *Id.* at 124; *see also* CIVIL DISCOVERY STANDARDS, Standard I.3, cmt. ("Sanctions might include ... requiring a party or counsel to pay the other side's counsel fees and expenses caused by the default or failure.").

[7] STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 124; *see also* SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2 ("the judge should ordinarily impose the least severe sanction appropriate").

years of study and discussion by leading members of this diverse organization.[8]

As the ABA standards reflect, the ABA does not condone any discovery abuse.[9] On the other hand, even bad faith misconduct does not permit a court to deviate from the established standards that govern attorney-fee sanctions – or the heightened procedural protections that are necessary when a court imposes a fine that goes beyond the amount of the extra expenses caused by the misconduct. As Justice Kennedy stated when dissenting in *Chambers*, "our outrage at [t]his conduct should not obscure the boundaries of settled legal categories." *Chambers*, 501 U.S. at 60-61 (Kennedy, J., dissenting).

The ABA submits, therefore, that the judgment of the Ninth Circuit should be reversed because it upheld an attorney-fee sanction that was significantly higher than the fees traceable to the discovery violations – and did so without observing required procedural protections.

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[8] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[9] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.3.

SUMMARY OF ARGUMENT

The question presented should be answered in the affirmative. In particular, an attorney-fee sanction under inherent power – like the one imposed in this case – must be limited to the expenses caused by the misconduct unless heightened procedural protections have been observed.

The ABA's position is based on standards that it developed after years of studying sanctions law, including this Court's decisions on the federal courts' inherent power to punish litigation misconduct. These standards reflect several governing principles.

First, the American Rule bars fee-shifting with only three narrowly defined exceptions when a court is acting under inherent power. One of the exceptions permits the use of an attorney-fee sanction to punish bad faith conduct falling short of contempt-of-court, but only if the award is remedial. This exception shares a common goal with the Federal Rules of Civil Procedure, which also authorize compensatory attorney-fee sanctions for non-contumacious litigation misconduct. Thus, both sources of sanctioning power allow a court to punish misconduct through fee-shifting, but the *measure* of this punishment is the amount of fees caused by the violation. Notably, this sanction is less drastic than the sanctions available for contempt, which may include a noncompensatory fine equal to the entire cost of the litigation if criminal due process is applied.

Second, due process demands proportionality in the assessment of fees under inherent power to guard against arbitrary punishment, which is a risk when a court functions as accuser, prosecutor, and sentencer.

The ABA standards embrace this concept by instructing trial judges to select the "least severe sanction" needed to serve the purpose at hand. Accordingly, when punishment is meant to be remedial in nature, the court should avoid an attorney-fee sanction that is over-inclusive, awarding fees that go beyond those caused by the violation. Furthermore, the notice aspect of due process requires a court to distinguish between a remedial attorney-fee award and a larger non-compensatory fine because, if a party is facing the latter, it must be told this in advance so that it can avail itself of the higher procedural protections that apply in that circumstance.

As this Court has held, the heightened procedural protections required of criminal proceedings must be observed if a court wants to rely on inherent power to impose a significant non-remedial fine – like the attorney-fee sanction in this case, which even the district court acknowledged was vastly greater than the fees that were traceable to the misconduct.

Finally, the ABA recognizes that it may be hard to tell what expenses were directly caused by the misconduct. Such difficulty cannot, however, enlarge inherent powers or eliminate procedural protections. Instead a court should consider how causation issues are resolved in other fee contexts (such as "prevailing party" awards under fee-shifting statutes) and exercise its discretion accordingly.

In this case, however, the Ninth Circuit held that no such effort is required. That was error. Accordingly, the judgment below should be reversed.

ARGUMENT

AN ATTORNEY-FEE SANCTION UNDER INHERENT POWER MUST BE LIMITED TO THE EXPENSES CAUSED BY THE MISCONDUCT UNLESS HEIGHTENED DUE PROCESS PROTECTIONS HAVE BEEN OBSERVED.

A. Under traditional sanctions law, only those attorney's fees caused by the misconduct may be awarded absent contumacious conduct.

The ABA's standards address various sources of authority for sanctioning misconduct in litigation, such as Rule 11, the discovery rules, 28 U.S.C. § 1927, and inherent authority. *See* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 104. None of the ABA standards, however, considers the possibility of an attorney-fee sanction that is higher than the amount necessary to compensate the other side for the expenses caused by the violation. The ABA standards consistently state that an attorney-fee sanction should be limited to the amount necessary to remedy the misconduct.

Under the ABA standards, for example, a court can punish discovery abuse by making a party or counsel "pay the other side's counsel fees and expenses *caused by the default or failure.*" CIVIL DISCOVERY STANDARDS, § I.3, cmt. (emphasis added). Similarly, the ABA standards on Rule 11 practice state that a court may award "reasonable expenses, including reasonable attorneys' fees, *incurred as a result of the misconduct.*" STANDARDS FOR RULE 11

PRACTICE, Part L, § 2, 121 F.R.D. at 124 (emphasis added).[10]

This causation element, which runs throughout the ABA standards, comports with this Court's explanation of the "American Rule." *See Chambers*, 501 U.S. at 46.

The American Rule prohibits fee shifting in most cases. *Id.* at 45 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975)). Indeed, there are just three "narrowly defined" exceptions to the American Rule when a court is acting under inherent power: (1) a "common fund" award; (2) sanctions for the willful disobedience of a court order; and (3) attorney's fees imposed when a party has acted in bad faith. *Id.* Only the third exception applies here, as the record shows no common fund or finding that a court-order was violated.

The third exception serves the dual purposes of punishment and remediation. *Id.* at 46. Thus, while a court has inherent power to punish bad faith with an attorney-fee sanction, the measure of this punishment is the amount necessary to make the injured party "whole" by giving him the "expenses caused by his opponent's obstinacy." *Id.* (quoting

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[10] Although these standards refer to sanctioning authority under the Federal Rules of Civil Procedure, they provide valuable guidance for sanctions under inherent power as well. *see , e.g., TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring) (stating that the ABA's *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* should be considered whenever sanctions are at issue).

Hutto v. Finney, 437 U.S. 678, 689 n.14 (1979)). The punishment – the attorney's fees – must also serve the remedial purpose, which limits the sanction to the extra fees incurred as a result of the misconduct.

Significantly, *Chambers* distinguished the attorney-fee sanction authorized by the third exception, which applies here, from sanctions that are available under the second exception, which deals with contempt of court. *Chambers*, 501 U.S. at 45-46. Under the second exception, "a court's discretion to determine '[t]he degree of punishment for contempt' permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation." *Id.* at 45. Furthermore, the Court characterized that "fine" as "more drastic" than the remedial attorney-fee sanction for bad faith conduct that does not violate a court order:

> The imposition of sanctions [under the third exception] ... serv[es] the dual purpose of "vidicat[ing] judicial authority *without resort to the more drastic sanctions available for contempt of court* and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy."

Id. (emphasis added).

In *Chambers*, the Court approved an attorney-fee sanction that "represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. *Chambers*, however, involved contumacious conduct. *Id.* at 57. "[Th]ere, for example, Chambers' attempt to gain the FCC's permission to build a new

transmission tower was in direct contravention of the District Court's orders to maintain the status quo pending the outcome of the litigation and was therefore within the scope of the District Court's sanctioning power." *Id.*

"Thus, a court's discretion to determine '[t]he degree of punishment for contempt' permit[ted] the court to impose as part of the fine attorney's fees representing the entire cost of the litigation." *Id.* at 45. But where, as here, the court is not punishing for contempt, inherent power to impose an attorney-fee sanction is restricted to those expenses directly caused by the misconduct. *See id.* at 46; *Kerrin v. U.S. Postal Service*, 218 F.3d 185, 190 (2d Cir. 2000) (noting remedial goal of attorney-fee sanction under inherent power).

There is another reason why *Chambers* sets no precedent for the non-remedial fine in this case – the sanction there was compensatory. *See Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1256-57 (2016) (Watford, J., dissenting). The sanction awarded fees for the entire case, but it was calibrated to the harm because the misconduct occurred throughout the entire case, from start to finish. *Id.* The award, therefore, was authorized under both the second and the third exceptions to the American Rule.

In sum, under traditional sanctions law as set out by *Chambers* and the ABA standards, a court's inherent power to use an attorney-fee award to punish non-contumacious conduct is limited to making the transgressor pay for those expenses incurred as a result of the misconduct.

B. The proportionality and notice aspects of due process require that compensatory sanctions be linked to the misconduct.

When relying on inherent power to impose an attorney-fee sanction for bad faith conduct, a court must observe due process "both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50.

Due process demands proportionality in the assessment of fees to guard against arbitrary punishment, which is a risk when a court functions as accuser, prosecutor, and sentencer. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994).[11] And arbitrary results should be avoided whether the sanctions are criminal or civil. *See id*; *see also Roadway Express, Inc.*, 447 U.S. at 763 (discussing the need for consistency in attorney-fee sanctions).

The ABA's standards on the "Special Functions of the Trial Judge," therefore, instruct that a judge should select the "least severe sanction" needed to serve the purpose at hand:

> **If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition. . .**

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[11] *Cf. Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 499 (2008) (finding that inherent authority to impose sanctions for litigation misconduct is curbed by notions of proportionality required by the Eighth Amendment).

SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2 (emphasis original); *see also* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 124 (instructing courts to impose the "least severe sanction").

ABA commentary also explains that "[a]n unnecessarily severe sanction may be self-defeating, as may any appearance of passion or pettiness, because it will bring 'discredit to a court as certainly as the conduct it penalizes.'" SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2, cmt.

The judgment in this case contravenes these principles by imposing an attorney-fee sanction that is not tailored to the expenses caused by the discovery violations. Indeed, the district court found that – if a direct connection is required – the sanction should be reduced by over $700,000. Order (8/26/2013) (Doc. 1125) at 7. A fine that so greatly exceeds the compensatory purpose of the third exception to the American Rule runs afoul of due process because it lacks proportionality.

Due process also has a notice requirement. Notice must be given of the type of sanctions a party is facing in addition to notice of what conduct is being challenged.

> The party sought to be sanctioned is entitled to particularized notice including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration, and 3) the form of sanctions under consideration. Id. Only

> with this information can a party respond to the court's concerns in an intelligent manner.

Simmerman v. Corino, 27 F.3d 58, 64 (1994); *see also* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 127 ("Sanctions may not be imposed upon a person who is not on notice of . . . *the type of sanctions* under consideration." (emphasis added).

In this case, there is disagreement over what type of sanctions were imposed. The majority opinion says that the sanctions were compensatory even though they were significantly greater than the amount that the district court said it would award if the sanction must be limited to the extra fees traceable to the misconduct. The dissent, however, argues that the attorney-fee award was a noncompensatory punitive sanction. This difference is material because – even though both involve an attorney-fee award – heightened procedural protections apply to the second type of sanctions. *See Bagwell*, 512 U.S. at 834; *see also infra* at Section C. Due process requires courts to recognize the difference between these types of sanctions – a remedial attorney-fee award versus a larger noncompensatory fine – because, if a party is subject to the latter, it must be told this in advance so that it can avail itself of the higher procedural protections that apply in that circumstance.

C. If a court exercises inherent power to punish non-contumacious bad faith conduct with an attorney-fee sanction that exceeds the expenses caused by the misconduct, heightened procedural protections must be observed.

Judge Watford's dissent argued that, "[i]f the sanctions that can properly be deemed compensatory seem too paltry under the circumstances, the district court could still fashion an award of punitive sanctions, so long as it applies the corresponding heightened procedural protections." *Haeger*, 813 F.3d at 1258 (Watford, J., dissenting). The ABA, however, does not concede that, absent contumacious conduct, a court has inherent authority to punish discovery abuse with a substantial non-compensatory attorney-fee fine under any circumstances.[12] But, if inherent power does permit a non-contempt attorney-fee sanction greater than the expenses traceable to the discovery abuse, the ABA agrees that such a sanction would require heightened procedural protections.

Bagwell discussed the means other than contempt that can be used to remedy misbehavior by litigants and their lawyers – such as striking pleadings,

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[12] Again, *Chambers* recognized that, when faced with contumacious conduct, a court has inherent power to "impose as part of the fine attorney's fees representing the entire cost of the litigation." *Chambers*, 501 U.S. at 45. But it contrasted that type of sanction with the less drastic sanctions available under the third exception to the American Rule, which governs here. Further, *Chambers* explained that, under the third exception, inherent power may be used to punish bad faith conduct with a *compensatory* attorney-fee award.

assessing costs, excluding evidence and entering a default judgment. *Bagwell*, 512 U.S. at 833. It observed that, like coercive civil fines, those sanctions have never been considered criminal and thus have not warranted criminal due process. *Id.* *Bagwell*, however, contrasted those civil sanctions with fines that are "noncompensatory" in character. *Id.* at 834.

Bagwell stressed that the district court had made no attempt to calibrate such serious fines to damages caused by the misconduct "or indicate that the fines were 'to compensate the complainant for losses sustained.'" *Id.* (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)). The fines, therefore, were "more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." *Id.* at 837. Accordingly, the Court held that the heightened procedural protections required of criminal proceedings must be observed before such fines could be imposed. *Id.* at 837-38; *cf. id.* at 839 (excluding "petty" noncompensatory fines from the heightened procedural requirements). *Bagwell*, therefore, advanced the teaching of *Chambers* by making clear that, if monetary sanctions under inherent power stray from the causal-compensatory measure, they must be accompanied by heightened procedural protections.

Like the fines in *Bagwell*, a significant attorney-fee sanction that is not calibrated to the damage caused by the misconduct is closer to a criminal fine than the traditional civil means of controlling judicial proceedings. Thus, the hefty noncompensatory award in this case also requires heightened procedural

protections. *See id.* at 837-38; *see also FTC v. Trudeau*, 579 F.3d 754, 770 (7th Cir. 2009) ("If any part of [the attorney-fee sanction] winds up being punitive instead of remedial, then criminal proceedings are required to sustain it.").

Simply put, "[w]here, as here, 'a serious contempt [or analogous fine] is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.'" *Bagwell*, 512 U.S. at 839 (quoting *Bloom v. Illinois*, 391 U.S. 194, 209 (1968)).

Finally, the ABA understands that courts may face a challenge when trying to identify the expenses directly caused by a failure to disclose in discovery. Such difficulty, however, cannot enlarge inherent powers or eliminate procedural protections. Instead, a district court should consider how courts resolve causation issues in other fee contexts – keeping in mind the black letter principle that "the judge should ordinarily impose the least severe sanction appropriate to correct the abuse." SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2.

For example, a similar problem was addressed in a "prevailing party" case, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). *Hensley* found that, if there was only partial success, total hours times a reasonable rate might yield an excessive award. *Id.* A district court, therefore, must make an effort to trim the non-compensable hours. *Id.* There is no precise formula for this task, but a court has options. *Id.* It "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the

limited success. *Id.* at 436-37. The court's discretion is always bounded, however, by its authority to shift fees. *Id.* at 437; *see also Trudeau*, 579 F.3d at 770.

Yet, in this case, the Ninth Circuit held that no such effort is required – even though the sanction was patently over-inclusive, awarding far more than the expenses that were directly caused by the misconduct. Because this excessive fee-shifting is more analogous to a criminal fine than traditional civil sanctions, it was error to impose it without observing the heightened procedural protections required of criminal proceedings.

CONCLUSION

For the reasons set forth herein, the American Bar Association requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted.

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November 21, 2016